

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

GONZALO JAVIER BARAJAS,
Defendant.

No. CR-05-2033-FVS

ORDER

THIS MATTER came before the Court on May 11, 2005, based upon the defendant's motion to dismiss. He was represented by Ulvar W. Klein. The government was represented by Assistant United States Attorney Gregory Shogren.

BACKGROUND

On December 14, 2004, an indictment was filed in CR-04-2182-EFS charging the defendant with conspiring, between October 1, 2004, and October 29, 2004, to distribute a controlled substance. On February 7, 2005, the indictment was dismissed without prejudice on the government's motion. On February 9, 2005, a complaint was filed in CR-05-2033-FVS charging the defendant with conspiring, between June 1, 2004, and October 29, 2004, to distribute a controlled substance. On March 15, 2004, an indictment was filed. The defendant claims the conspiracy alleged by the government in CR-04-2182-EFS is the same conspiracy alleged by the government in CR-04-2033-FVS. Since over 70 days have elapsed since the indictment was filed in CR-04-2182-EFS, and since little of the period from December 14, 2004, until the

1 present is excludable under the Speedy Trial Act, the defendant moves
2 to dismiss on the ground his right to a speedy trial has been
3 violated.

4 **RULING**

5 Both indictments allege that the defendant conspired to
6 distribute methamphetamine in violation of 21 U.S.C. §§ 846 and
7 841(a)(1). The second indictment differs from the first in
8 essentially two respects. First, the government alleges the
9 conspiracy began on June 1, 2004, instead of October 1, 2004.
10 Second, the government alleges that additional overt acts occurred
11 during the period between June 1st and October 1st. Despite these
12 differences, the defendant submits that both indictments charge the
13 same offense. In order to determine whether he is correct, the Court
14 must consider five factors: "(1) the differences in the periods of
15 time covered by the alleged conspiracies; (2) the places where the
16 conspiracies were alleged to occur; (3) the persons charged as
17 coconspirators; (4) the overt acts alleged to have been committed;
18 and (5) the statutes alleged to have been violated." *United States*
19 *v. Stoddard*, 111 F.3d 1450, 1454 (9th Cir.1997). The two
20 conspiracies are similar in a number of respects. The time period
21 alleged in the second indictment includes the time period alleged in
22 the first. The place in which the conspiracies are alleged to have
23 occurred is the same. The alleged goals of the two conspiracies are
24 much the same. In both, Jose Alvarez allegedly either arranged for
25 the defendant to distribute methamphetamine or Mr. Alvarez obtained
26 methamphetamine from the defendant for distribution. See *United*
States v. Ziskin, 360 F.3d 934, 947 (9th Cir.2003) ("We must
determine whether the roles performed by the overlapping members were
different in each conspiracy.'" (quoting *United States v. Montgomery*,

1 150 F.3d 983, 991 (9th Cir.1998))). The only obvious difference
2 between the two indictments is that the second alleges more overt
3 acts over a somewhat longer period of time. The government has
4 failed to establish, by citation to Ninth Circuit precedent, that
5 this distinction is sufficient to establish a real difference between
6 the two conspiracies. Consequently, the Court concludes that the
7 conspiracy charged in the first indictment is simply a subset of the
8 conspiracy charged in the second indictment.

8 **IT IS HEREBY ORDERED:**

9 1. The defendant's motion to dismiss (Ct. Rec. 21) is granted.

10 2. The indictment will be dismissed with prejudice unless,
11 within seven days of the entry of this order, the government files
12 and serves a memorandum discussing 18 U.S.C. § 3162(a)(2) in light of
13 Ninth Circuit cases that have interpreted this statute.

14 3. If the government files a memo opposing dismissal with
15 prejudice, the defendant may have seven days in which to file and
16 serve a response.

17 **IT IS SO ORDERED.** The District Court Executive is hereby
18 directed to enter this order and furnish copies to counsel.

19 **DATED** this 16th day of May, 2005.

20 s/ Fred Van Sickle
21 Fred Van Sickle
22 Chief United States District Judge
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